

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 67, AFSCME, AFL-CIO

and

CITY OF RACINE

Case 552
No. 56712
MA-10387

Appearances:

Mr. John P. Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 624, Racine, Wisconsin 53401-0624, appearing on behalf of the Union.

Mr. Guadalupe G. Villarreal, Deputy City Attorney, 730 Washington Avenue, Racine, Wisconsin 53403, appearing on behalf of the City.

ARBITRATION AWARD

City of Racine, hereafter City or Employer, and Local 67, AFSCME, AFL-CIO, hereafter Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of certain disputes. The Union, with the concurrence of the City, requested the Wisconsin Employment Relations Commission to appoint a staff member as a single, impartial arbitrator to resolve the instant grievance. On September 16, 1998, the Commission appointed Coleen A. Burns, a member of its staff, as arbitrator to hear and decide the instant dispute. Hearing in the matter was held on March 15, 1999, in Racine, Wisconsin. The hearing was transcribed. The record was closed on May 20, 1999, upon receipt of post-hearing written argument.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUE

The City frames the issue as follows:

Did the Employer violate the collective bargaining agreement when it continued the practice of using the employee assigned to Horlick Field for any required overtime work at Horlick Field?

If so, what is the appropriate remedy?

The Union frames the issue as follows:

Is the City violating the collective bargaining agreement by not equally dividing the overtime at Horlick Field among employees classified as Equipment Operators?

If so, what is the appropriate remedy?

The undersigned adopts the Union's statement of the issue.

RELEVANT CONTRACT LANGUAGE

ARTICLE XI

Hours and Wages

. . .

E. Overtime.

. . .

6. Overtime shall be divided as equally as possible at least quarterly during the course of the calendar year, and overtime Lists shall be posted in each department, premised upon the above-noted allocation of overtime equalization. For the purposes of this agreement, equalization dates shall be as follows: January 1; April 1; July 1; and October 1.

7. Emergency Overtime. Employees are required to work emergency overtime. An emergency for the purpose of this section shall constitute an unforeseen occurrence (including but not limited to all weather problems) requiring immediate action to provide necessary City services.

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ARTICLE XIII

Miscellaneous Provisions:

M. Entire Agreement: The foregoing constitutes the entire Agreement between the parties and no verbal statement shall supersede any of its provisions. Any oral agreements, practices or statements not specifically set forth herein are hereby declared null and void and of no effect. None of the terms and conditions of this Agreement may be modified except by mutual agreement in writing.

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BACKGROUND

On March 9, 1998, the City posted a position for an Equipment Operator to work at Horlick Field from 7:00 a.m. to 3:00 p.m., Monday through Friday, from March 15th through November. The posting was limited to employees in the Parks Department, General Systems, with a Category 3 Ornamental and Turf Commercial Pesticide Certification. Richard Hetland posted for, met the requirements of, and received this position.

Previously, a Custodian performed all but one of the duties assigned to Hetland's position. When the Custodian retired, the position was reclassified to Equipment Operator and the duty of spraying pesticide was added to the position. At all times, Custodians assigned to a specific facility, including Horlick Field, received Custodian overtime that was available at that facility.

On or about May 28, 1998, a grievance was filed in which it was alleged that the City had violated the collective bargaining agreement by assigning all of the overtime work at Horlick Field to Hetland. The grievance was denied at all steps and, thereafter, submitted to arbitration.

During calendar year 1998, Hetland received overtime of 54.6 hours at time and one-half and 27.7 hours at double time. Of these overtime hours, 34.9 hours at time and one-half and 23.2 hours at double time were received at Horlick Field.

In 1998, the following Equipment Operators worked overtime as follows:

Tom Gray	23 hours at time and one-half and no double time
Jeff Kimberlain	13.8 hours at time and one-half and 10.9 hours at double time
Scott Koeshall	28.1 hours at time and one-half and no double time
Bob Orton	14.2 hours at time and one-half and 8 hours at double time
Art Felix	19.4 hours at time and one-half and 8 hours at double time
Bob Bueno	18.3 hours at time and one-half and 8 hours at double time
Clifton Barker	23.4 hours at time and one-half and 11 hours at double time
Tim Uick	30.2 hours at time and one-half and 3 hours at double time
Chuck Besler	29.1 hours at time and one-half and 9 hours at double time

POSITIONS OF THE PARTIES

Union

The Parks Department Equipment Operator assigned to Horlick Field is granted all available overtime. This not only violates the clear and unambiguous language of Article XI, Section E (6), but also, is contrary to a long-established practice of overtime distribution in which Parks Department Equipment Operator overtime is divided equally among all such classified workers, regardless of their assigned work location. When the City decided to use an Equipment Operator in lieu of a Custodian, it became bound to the distribution of overtime equally among all Parks Department Equipment Operators.

The record evidence does not support the argument that others are not qualified to perform overtime duties at Horlick Field. As the Union witnesses testified, their regular duties parallel those of the Equipment Operator at Horlick Field and they had worked overtime at Horlick Field without a problem.

The grievance should be sustained. The City should be directed to cease and desist from granting overtime exclusively to the individual at Horlick Field and to make whole the Parks Department Equipment Operators who lost overtime opportunities as a result of the City's actions.

City

At all times, Horlick Field has been assigned one full-time employe to maintain the facility. Prior to 1998, the employe assigned to Horlick Field was classified as a Custodian.

In 1998, the position was reclassified to Equipment Operator. The reclassified position retained all of the previous duties, with the added requirement that the employe possess a Category 3 Ornamental Turf and Pesticide Certificate. The Union did not grieve this added requirement.

Horlick Field is a unique City recreational complex in that it has a regular football and baseball/softball diamond, spectator stands for football and softball, concession stands, and bathroom facilities. It is the only City athletic facility that is manned by a full-time employe and, thus, is comparable to the City's community centers that are staffed by one full-time employe.

The Custodian that is assigned to a community center, like the employe assigned to Horlick Field, has always performed the overtime work at the assigned worksite. These employes do not share overtime within their classification because the work performed requires specific training, knowledge and expertise about the facilities, e.g., heating plants, electrical and sound systems, breaker boxes. The employe assigned to Horlick Field, for example, marks batters boxes and foul lines on a baseball field with grass in the infields; operates scoreboards; and maintains a more complicated plumbing system in the bathrooms.

The Union never grieved the assignment of overtime to Custodians. The Union ratified this practice when it resolved a prior grievance involving a Custodian at Horlick Field and agreed that the Custodian should receive all of the overtime produced by the settlement.

Equipment Operators in the Parks Department are on an overtime list. Generally, overtime is first offered to employes at the bottom of the overtime list. There are exceptions to this general rule, e.g., Charles Besler is the first employe called in to perform overtime work at North Beach because he is assigned to a particular location at North Beach. The Union has not grieved this assignment of Besler.

The labor contract does not require equal overtime. Rather, it requires the City to divide overtime as equally as possible. Normally, Equipment Operators receive overtime in the winter, and not the summer. The employe assigned to Horlick Field receives overtime in the summer, but is restricted with respect to eligibility for winter overtime.

The City is dividing overtime as equally as possible and consistent with procedures that have been accepted by both parties. The grievance should be denied.

DISCUSSION

As the Union argues, the controlling contract language is found in Article XI, E (6), of the parties' collective bargaining agreement. This provision states as follows:

Overtime shall be divided as equally as possible at least quarterly during the course of the calendar year, and overtime Lists shall be posted in each department, premised upon the above-noted allocation of overtime equalization. For the purposes of this agreement, equalization dates shall be as follows: January 1; April 1; July 1; and October 1.

Although the Custodians and Parks Department Equipment Operators are subject to the same contractual overtime provision, different procedures have been used to assign overtime to the two classifications.

It is undisputed that Custodians are assigned to a particular building and are entitled to work all Custodian overtime in that building. Under this procedure, custodians received the following overtime in 1998:

	<u>Time and One-half</u>	<u>Double Time</u>
Rich Lougham	33.4 hours	12.0
Jimmy Miller	33.1	10.0
Frege Simpson	18.0	3.0
John Cervantes	7.2	0.0

The City argues that the Custodian overtime practice is predicated upon the parties' mutual understanding that each facility is unique and that only the employee assigned to the facility has the knowledge of and expertise to perform overtime work at the facility. The record, however, does not demonstrate what, if any, mutual understandings gave rise to the Custodian overtime practice. Absent such evidence, the Custodian overtime practice cannot be given broader application.

Contrary to the argument of the City, neither the evidence of the Custodian overtime practices, nor the evidence of the Ronald Nelson grievance settlement relied upon by the City, demonstrates any mutual understanding with respect to the assignment of overtime to any classification other than Custodian. Accordingly, this evidence is not controlling.

Forestry workers and Equipment Operators, who have an interest in working overtime, are placed on the Parks Department overtime list. Generally, management offers available overtime to the next employe on the overtime list.

There are exceptions to this general rule. For example, Forestry workers receive the first opportunity to work overtime if there is a downed limb, or other storm damage. According to Parks Superintendent Jim Richards, this preference is given to the Forestry workers because it is their "specialty." (T. at 66)

Another exception is that of Chuck Besler. Besler, an Equipment Operator, is assigned to North Beach and is given first opportunity to work overtime at North Beach, regardless of his placement on the overtime list. It may be that, as with the Forestry workers discussed above, the work performed at North Beach is Besler's "specialty." The record, however, does not establish the reason for this "first" overtime opportunity.

At first blush, the Besler "exception" supports the conclusion that an Equipment Operator assigned to a particular facility performs all of the overtime available at the facility. It is not evident, however, that Equipment Operator Tim Uick, who is assigned to Johnson Park, is given any "first" opportunity to work overtime at Johnson Park.

In summary, the record fails to demonstrate that the parties have a mutually accepted past practice of assigning Equipment Operator overtime work to the Equipment Operator that is assigned to a particular facility. The most reasonable conclusion to be drawn from the evidence of past practice is that Equipment Operator overtime is made available to all interested Equipment Operators and is assigned through use of the Parks Department overtime list.

Richard Hetland receives the Equipment Operator overtime at Horlick Field, if he is available to perform that overtime. Hetland is not on the Parks Department overtime list and is not called upon to perform other overtime unless the overtime list has been exhausted.

As a result of this method of assigning overtime to Hetland, Hetland has received significantly more overtime than have the other Equipment Operators in the Parks Department. Thus, the City's method of assigning overtime to Hetland violates the requirements of Article XI, E (6), unless the record demonstrates that it is not possible to divide the overtime more equally.

As the City argues, Horlick Field is unique among the City's recreational facilities. The record, however, does not demonstrate that it is not possible for the other Parks Department Equipment Operators to perform the overtime duties at Horlick Field, which overtime duties primarily involve grass cutting, keeping public areas and facilities clean and in good working order, and ensuring that the field is set up for the appropriate sports activity or activities. 1/

1/ If, following reasonable instruction, an Equipment Operator does not perform the Horlick overtime duties in a satisfactory manner, then the City may reasonably conclude that the Equipment Operator is not qualified to perform the overtime work and, thus, that it is not possible to assign this overtime to that Equipment Operator.

As the City further argues, the posting for the Horlick Field Equipment Operator position contained a pesticide license requirement and Hetland, unlike some of the other Equipment Operators, possesses this license. Inasmuch as the evidence fails to demonstrate that the overtime duties performed by Hetland are duties that require this pesticide license, the lack of such a license does not provide a reasonable basis to conclude that it is not possible for unlicensed Equipment Operators to perform the Horlick Field overtime work. 2/

2/ The record does not establish that Hetland's Horlick Field overtime assignments included a requirement to check the field for pythium, or other types of turf diseases. Nor does the record establish that pythium cannot be recognized by Equipment Operators other than those who, like Hetland, possess a Category 3 Ornamental and Turf Commercial Pesticide Certification.

CONCLUSION

Article XI, E (6) of the parties' collective bargaining agreement requires the City to divide overtime among Equipment Operators "as equally as possible." The record does not establish that it is not possible to assign the Horlick Field Equipment Operator overtime to Equipment Operators other than Hetland. By assigning Horlick Field Equipment Operator overtime work exclusively to Hetland, the City has failed to divide overtime among Equipment Operators as equally as possible and, therefore, has violated Article XI, E (6), of the parties' collective bargaining agreement.

In remedy of this contract violation, the City is directed to add Hetland's name to the Parks Department overtime list and to offer Equipment Operator overtime to Hetland in the same manner as such overtime is offered to other Equipment Operators. Additionally, the City is directed to assign Horlick Field Equipment Operator overtime by use of the Parks Department overtime list and in the same manner as the list is used to assign other Equipment Operator overtime.

Inasmuch as the City's contract violation deprived other Equipment Operators of 1998 overtime opportunities, it is appropriate to order a make whole remedy. Under the normal overtime procedures used by the City and accepted by the Union, Tim Uick received the most overtime at time and one-half, i.e., 30.2 hours. The difference between Uick's 30.2 time and one-half hours and Hetland's 54.6 time and one-half hours is 24.4 hours.

The record does not establish which Equipment Operators would have been assigned Horlick Field 1998 overtime if this overtime had not been assigned to Hetland. Unless the City and the Union agree otherwise, the appropriate make whole remedy is for the City to divide 24.4 hours equally among all current Equipment Operators, except Hetland, who were

employed as Equipment Operators and on the Parks Department overtime list, as of May 28, 1998 (the date of the grievance) and pay each of these employees the resulting number of hours at time and one-half, based upon each employee's 1998 rate of pay.

Under the normal overtime procedures used by the City and accepted by the Union, Clifton Barker received the most double time, i.e., 11 hours. The difference between Barker's 11 hours and Hetland's 27.7 hours of double time is 16.7 hours of double time.

Unless the City and the Union agree otherwise, the appropriate make whole remedy is for the City to divide 16.7 hours equally among all current Equipment Operators, except Hetland, who were employed as Equipment Operators and on the Parks Department overtime list, as of May 28, 1998 (the date of the grievance) and pay each of these employees the resulting number of hours at double time, based upon each employee's 1998 rate of pay.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The City violated Article XI, E (6), of the parties' collective bargaining agreement by not dividing Equipment Operator overtime as equally as possible.

2. In remedy of this contract violation, the City shall immediately:

- a) Add Richard Hetland's name to the Parks Department overtime list;
- b) Offer available Equipment Operator overtime to Richard Hetland in the same manner as such overtime is offered to the other Parks Department Equipment Operators;
- c) Assign Horlick Field Equipment Operator overtime by using the Parks Department overtime list in the same manner as the City assigns other overtime to Parks Department Equipment Operators;
- d) Make Parks Department Equipment Operators whole for lost overtime opportunities in the manner described above.

Dated at Madison, Wisconsin, this 22nd day of June, 1999.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator